

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
JULY SESSION, 1996

FILED
October 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

KIRBY G. THURMON,)

Appellant.)

C.C.A. NO. 02C01-9512-CR-00375
Cecil Crowson, Jr.
Appellate Court Clerk

SHELBY COUNTY

HON. BERNIE WEINMAN
JUDGE

(DUI)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals to this court as of right from a judgment entered on a Shelby County jury verdict convicting him of driving under the influence of an intoxicant and diazepam. The Defendant presents seven issues for review: (1) That he was unable to consent to the blood alcohol test and, therefore, the trial court erred in admitting the blood test results; (2) that the court erred by admitting the blood test results without establishing the chain of custody; (3) that his pretrial detention without bail was a punishment resulting in double jeopardy when the charges were tried; (4) that admitting a photograph of him was unduly prejudicial; (5) that the State failed to prove he was in control of and driving his vehicle on a public roadway; (6) that testimony regarding the blood test results from a copy of a computer printout violated the best evidence rule; and (7) that the evidence was insufficient to support a guilty verdict. We affirm the judgment of the trial court.

We begin with a brief summary of the facts. On June 11, 1994 at approximately 2:45 a.m., the Memphis Police Department received a call reporting that a vehicle had run off the road. The caller was at the scene and directed the investigating officer to a car located in the front yard of a residence. The officer found the Defendant in the car, which was in “drive.” The Defendant’s foot was still on the gas pedal. The officer spoke to the Defendant through the closed window of the car, but the Defendant was unresponsive.

The police officer called another officer to the scene, at which time both officers opened the car doors at the same time, turned off the ignition and put the vehicle in "park". The Defendant was sitting up in the seat, but only mumbled incoherently when the officers tried to communicate with him. They detected an odor of an intoxicant on his breath and noticed a bottle of diazepam containing a few pills. The officers called for a paramedic unit. The officers continued to speak to the Defendant, who was awake, yet when he spoke it was unintelligible. When the unit arrived, the paramedics and the officers helped the Defendant onto a stretcher because he could not walk. He resisted being put on the stretcher and was strapped down and transported to the hospital.

The Defendant was admitted for trauma assessment at 3:55 a.m. He was taken to an exam room and was assisted from the stretcher to a bed and hospital personnel obtained a routine blood sample. At approximately 4:10 a.m., the Defendant was approached by a member of the DUI squad, who talked with him and asked if he would consent to a blood test. The Defendant answered verbally, "yes." The nurse drew the blood sample, which was received, tagged, put in a sealed box and transported by the DUI officer to the police substation at the end of his shift. The sample was taken to the University of Tennessee Toxicology Laboratory where testing subsequently revealed a 0.14 percent blood alcohol level and detected the presence of a diazepam metabolite. The Defendant was discharged into police custody at approximately 9:00 a.m. for booking and processing. He was released from custody at approximately 5:00 p.m.

The Defendant first argues that the trial court erred by denying Defendant's pretrial Motion to Suppress the blood test results. The Defendant asserts that he did not give a valid consent to submitting to the blood test and that this effected an unlawful search violating his constitutional right under the Fourth Amendment to the United States Constitution. He also argues that the trial court misapplied Tennessee Code Annotated section 55-10-406(b), which excludes the evidence of a blood test drawn from a person unconscious or incapable of refusing.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their person . . . against unreasonable searches and seizures, shall not be violated" The extraction of a blood sample is considered an intrusion that constitutes a search subject to Fourth Amendment protections. See Schmerber v. California, 384 U.S. 757, 767-72 (1966). Consent to a search is an exception to the warrant requirement if given voluntarily and understandingly. State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993), cert. denied, id. (Tenn. 1994), perm. to appeal denied, id. (Tenn. 1994). "The sufficiency of consent depends largely upon the facts and circumstances in a particular case." Id. The prosecution bears the burden to prove the validity of the consent. Id.

A Defendant may be too intoxicated to give consent voluntarily and understandingly. See Jackson, 889 S.W.2d at 221; Drinkard v. State, 584 S.W.2d 650, 654 (Tenn. 1979). "Actually, it is the degree of the driver's intoxication that should be determinative of this issue. . . ." Drinkard, 584 S.W.2d at 654.

The Defendant testified at trial that he had consumed three sixteen-ounce beers over the evening, had taken one five-milligram diazepam tablet and had not eaten that evening. The Defendant is a diabetic and his medication had been changed two days before his arrest. He testified that he felt weak and sweaty late in the evening and was attempting to go out and get something to eat when he had a hypoglycemic episode while driving. He swallowed several hard candies, but testified he had no memory after that.

The arresting officer testified that when the Defendant was discovered in his vehicle, he was unresponsive, incoherent and unable to walk. The officer testified that in attempting to elicit a response, the Defendant was “in a stupor” and “we couldn’t understand what he was talking about.”

After his admittance to the hospital, the Defendant was awake, but there was conflicting evidence presented during the suppression hearing concerning the Defendant’s ability to effectively communicate or understand. The trauma assessment of the Defendant described him as being oriented only as to his name, but not as to place or time. A letter admitted by stipulation during the suppression hearing also included a statement by the admitting physician, Dr. S. Winberry, that the Defendant was “acutely intoxicated and disoriented” and unable to give informed consent.

The blood for the test was drawn approximately fifteen minutes after the Defendant’s arrival at the emergency room. The Defendant’s primary communication was his verbal assent to the blood test. The DUI officer who requested the blood test testified that he spoke with the Defendant for

approximately fifteen minutes. The officer stated that he asked whether the Defendant understood what the consent form was and asked him several questions, which were answered, to complete the form. There was testimony from the arresting officer that the Defendant was argumentative during the time he spent in the emergency room; that he was cursing and threatened to sue the police.

The cause of the Defendant's stupor was contested as possibly intoxication or a hypoglycemic episode, or both. Regardless of the cause, the trial judge found that the Defendant was in such a condition that he was able to give his voluntary and understanding consent to the blood test. The determination of the Defendant's ability to voluntarily and understandingly consent was a contested issue of fact at the suppression hearing. Deference is given to the trial court to assess the credibility of the witnesses and determine issues of fact. At an evidentiary hearing on a motion to suppress evidence, the trial court's findings of fact are conclusive. Jackson, 889 S.W.2d at 222. The findings of the trial judge are afforded the weight of a jury verdict and will not be disturbed on appeal unless the evidence in the record preponderates against the judgment of the trial court. Id.; State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App.), perm to appeal denied, id. (Tenn. 1988). Where there is material evidence in the record that supports the findings of fact by the trial judge, we are required to affirm that judgment. Killebrew, 760 S.W.2d at 233.

We conclude from reviewing the evidence in the record in this case that there is material evidence to support the trial judge's finding that the Defendant was able to and did consent; therefore, the blood test was obtained by a search

within the constraints of the Fourth Amendment. Therefore, the trial court did not err in admitting the evidence of the blood test.

The Defendant also argues that the trial court misapplied Tennessee Code Annotated section 55-10-406(b) and (e). The relevant section of the Code provides that “[a]ny person who is unconscious as a result of an accident or is unconscious at the time of arrest or apprehension or otherwise in a condition rendering him incapable of refusal, shall be subjected to the test . . . but the results thereof shall not be used in evidence . . . without the consent of the person so tested.” Tenn. Code Ann. § 55-10-406(b). However, the blood test evidence may be used “in criminal prosecutions for aggravated assault or homicide by the use of a motor vehicle only.” Tenn. Code Ann. § 55-10-406(e).

Any driver in Tennessee is deemed to give implied consent to submit to a test for alcohol in the blood, yet also has the right to refuse such a test. Tenn. Code Ann. § 55-10-406(a)(1), (3). The issue here is whether the Defendant was “in a condition rendering him incapable of refusing” the test. The trial court based its ruling on the fact that the Defendant was not unconscious and was capable of refusing. For the reasons described above, we must affirm the trial court’s ruling that the Defendant was not in a condition that rendered him unable to understandingly refuse or consent to the blood test.

Because the consent for the extraction of the blood test was valid, the Defendant voluntarily submitted to the test. The blood test results are not subject to the constraints of Tennessee Code Annotated section 55-10-406(b), because the Defendant was capable of refusing at the time the blood test was drawn. His

election not to refuse the blood test allows use of the results at trial. Tenn. Code Ann. § 55-10-406(a)(1). The trial court did not violate Tennessee Code Annotated section 55-10-406(b), therefore, admitting the blood test was proper.

II.

The Defendant next argues that the state failed to prove the chain of custody of the blood sample tested by the laboratory. The purpose of establishing the chain of custody is to determine that there has been no tampering, substitution, mistake or loss of the evidence. State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993). The trial judge's determination that the chain of custody has been established will not be overturned unless there has been an abuse of discretion. Braden, 867 S.W.2d at 759; State v. McKinney, 605 S.W.2d 842, 846 (Tenn. Crim. App. 1980), perm. to appeal denied, id.; State v. Ritter, 462 S.W.2d 247, 249-50 (Tenn. Crim. App. 1970), cert. denied, id. (Tenn. 1971).

The Defendant notes that there was inconsistent testimony whether one or two vials of blood were drawn and that no testimony was presented from the officer who transported the sample from the substation to the laboratory. Although there is an inconsistency, there is no evidence that a substitution occurred. A properly labeled vial was delivered and tested following routine procedures. The proof of the chain of custody does not require that all doubt be eliminated before the sample may be admitted. See Ritter, 462 S.W.2d at 250. There is no evidence of an abuse of discretion in admitting the blood sample as evidence. This issue is without merit.

III.

The Defendant's third issue is that he was subjected to double jeopardy because his pretrial detention without bail consisted of a punishment. The Defendant asserts that the trial court failed to apply the standards set forth in State v. Jefferson Pennington, No. 01C01-9307-PB-00219, Davidson County (Tenn. Crim. App., Nashville, Feb. 1, 1996). The Defendant contends that the trial court failed to allow an evidentiary showing of the double jeopardy violation. This issue is waived because the defendant failed to make appropriate references to the record. Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988); see also T.R.A.P. 27(a)(7) and (g). However, we will address this issue on the merits.

Pretrial detention without bail may qualify as a punishment, violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Tennessee Constitution. A second risk of punishment at trial must be precluded if the detention is not imposed for a legitimate governmental purpose. See State v. Coolidge, 915 S.W.2d 820, 822-23 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1995). Detention for detoxification of an arrestee is considered a valid governmental purpose, yet a blanket policy of detaining DUI offenders for twelve hours has been found to violate double jeopardy as an impermissible punishment. See Coolidge, 915 S.W.2d at 822; Pennington, slip op. at 2-3.

Coolidge established a two-part test to evaluate the detention: (1) whether the detention serves some remedial purpose and (2) whether the detention is excessive to effect that purpose. The Defendant was detained from approximately 3:15 a.m. on June 11, 1995 to 5:00 p.m. that day. He was in the hospital ward until 9:00 a.m. because he was discovered in a stupor and needed immediate medical treatment. The trial court evaluated the evidence and determined that the detention of the Defendant was sufficiently remedial and necessary to protect the public and the Defendant. This case illustrates precisely a legitimate governmental purpose for detaining a DUI offender and does not violate double jeopardy. We affirm the ruling of the trial court on this issue.

IV.

The Defendant contends that the court erred in admitting a photograph taken of him approximately five hours after he was admitted to the emergency room. In order to admit a photograph as evidence, it must be relevant to an issue for the trier of fact and its probative value must outweigh the prejudicial effect. State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993). The trial court has the discretion to admit photographs as evidence. Braden, 867 S.W.2d at 758; State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). This court will not overturn the trial court's ruling absent a clear abuse of discretion appearing on the face of the record. Banks, 564 S.W.2d at 949.

We agree that the relevance of the admitted photograph is suspect to prove the condition of the Defendant when he was intoxicated, because there

was a five-hour lapse of time. However, there is no indication that the photograph prejudiced the Defendant. Although we believe it was error to admit the photograph into evidence at the trial, after considering the entire record in the case sub judice, we are satisfied that this was harmless error. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

V.

We will address Defendant's fifth and seventh issues together. He argues that the state failed to prove that he had driven or was in physical control of his motor vehicle on a Tennessee public road pursuant to Tennessee Code Annotated section 55-10-401(a). This section provides that it is unlawful to drive or to be in control of a motor vehicle on "any public roads or highways . . . streets or alleys." § 55-10-401(a). Tennessee uses a totality of the circumstances test to evaluate whether the accused was in physical control of a vehicle. State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993). The state may prove the offense by using direct or circumstantial evidence. Id. at 763. The vehicle need not be in motion, nor the engine running; the "present physical ability to direct the vehicle's operation and movement" is sufficient. Id. at 765.

In State v. Lisa Brewer, No. 01C01-9502-CC-00042, Franklin County, slip op. at 2 (Tenn. Crim. App., Nashville, Aug. 4, 1995), the driver was discovered in the car off the roadway, with no direct observation of the vehicle driving on the street. This court concluded that there was evidence sufficient to support the jury's conclusion that the vehicle had indeed used the street to travel from the Brewer's home to the front yard where the car was found. In the case sub judice,

the Defendant was found on the front lawn of a home and testified at trial that he had driven his car. This issue has no merit.

The Defendant also contends that the state did not prove the presence of diazepam in his blood and, therefore, the jury could not have reasonably convicted the Defendant of driving while under the influence of an intoxicant and diazepam. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

The Defendant's assertion must fail. The Defendant testified at trial that he had consumed intoxicants and diazepam. His primary argument was that he was too intoxicated to consent to the blood test. The jury heard conflicting expert testimony as to the stimulating effects of a diazepam metabolite in the bloodstream. The jury evaluated the evidence and assessed the relative credibility of the witnesses. After reviewing the record, we conclude that the jury could have reasonably found the Defendant guilty. This issue is without merit.

VI.

Finally, the Defendant asserts that the trial court violated Rule 1002 of the Tennessee Rules of Evidence by admitting testimony from a copy of a computer report of Defendant's blood test. He contends that this is not the best evidence to prove the results. Rule 1002 provides that an original document is needed to prove the content of a writing. Tenn. R. Evid. 1002. The Defendant asserts that the computer printout is a copy of the test results that were generated by the laboratory.

The blood test data is initially written on cards and reviewed by the technicians. The data is then entered onto a computer which generates a computer printout. The technicians review and sign the printout, and this is issued as the report. According to Rule 1001(3), "[i]f data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an 'original.'" Tenn. R. Evid. 1001(3). We are satisfied that the laboratory report is an original for purposes of Rule 1002; therefore, the trial court did not err in admitting the computer generated test results.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

CORNELIA A. CLARK, SPECIAL JUDGE